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Supreme Court of the United States

OCTOBER TERM, 1945

No. 1186

LEON S. DURE, Trustee of the Georgia, Florida & Alabama Railroad Company, and the Georgia, Florida & Alabama Railroad Company, Debtor,

Petitioner,

against

OTIS A. GLAZEBROOK, JR., JOSEPH FRANCE and S. RALPH WARNKEN, constituting the Reorganization Committee of the Seaboard Air Line Railway Company, and LEGH R. POWELL, JR., and HENRY W. ANDERSON, as Receivers,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

PAGE

OPINIONS BELOW 1

PRELIMINARY STATEMENT 2

BRIEF SUMMARY OF FACTS 5

ARGUMENT 9

POINT I—Petitioners have shown no grounds for granting the petition 9

POINT II—The decisions of the Circuit Court of Appeals and of the District Court in this case were correct 12

POINT III—The petition for certiorari should be denied 12

APPENDIX A 13

CASES CITED

Godfrey v. *Powell*, 150 Fed. (2d) 486 ..... 4, 11

Godfrey v. *Powell*, 66 Supreme Court Reporter 272 .. 4, 11

Young v. *Higbee Co.*, 324 U. S. 204 ..... 4, 10

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Opinions Below

The *per curiam* opinion of the United States Circuit Court of Appeals for the Fourth Circuit, adopting the opinion of the District Court, is reported in 152 Fed. (2d), at page 756. It is printed in the Record at page 126. The order of the District Court appealed from is printed in the Record at page 15. The opinion of the District Court is reported in 62 Fed. Supp., at page 207, and is printed in the Record at page 27.

Preliminary Statement

The Courts below decided that no constructive trust should be imposed, for the benefit of Georgia, Florida & Alabama Railroad Company (hereinafter called the G. F. & A.) or its stockholders, on bonds of the G. F. & A. purchased by the Reorganization Committee of Seaboard Air Line Railway Company (hereinafter called Seaboard) pursuant to Court order and to the Seaboard Reorganization Plan, with money impounded for the benefit of Seaboard creditors. The Courts reached that decision on the ground that there was no fiduciary relationship between the Seaboard creditors or the Seaboard Reorganization Committee or the Seaboard Receivers, on the one hand, and the G. F. & A. or its stockholders on the other hand.

As clearly appears from the opinion of the District Court, the real issue in this case is between the bondholders of Seaboard whose money was used to purchase the bonds of the G. F. & A., and two holders of First Preferred Stock of the G. F. & A. who purchased $1,000,000 par value of First Preferred Stock for $5,000. It is not, as the petition repeatedly states, a question of a large railroad trying to take over a small railroad. The G. F. & A. has been a part of the Seaboard System since 1927. The two holders of the First Preferred Stock of the G. F. & A. (who are the real parties in interest on the side of petitioners) seek to separate the G. F. & A. from the Seaboard System so that they may operate it themselves or, at least, to beat down the claims of the bondholders to such an extent that they can realize a very substantial profit on their purchase of the First Preferred Stock.

The Seaboard creditors are represented in these proceedings by the Seaboard Reorganization Committee, re-

spondents herein, who purchased the G. F. & A. Bonds with the money of the Seaboard creditors pursuant to Order No. R-1 of the District Court of the United States for the Eastern District of Virginia (R., p. 9). The Seaboard Receivers, who are also made respondents, have no direct interest in the case. The Receivers appeared in the proceedings below primarily because the petitioners made charges of bad faith against them in connection with reports of the operations of the G. F. & A. Those charges are conclusively disposed of in the opinion of the District Court (R., pp. 46, 47) and need not be considered here.

It is well established that this Court will not grant certiorari unless the question presented is one of public or general interest or unless there is a conflict of decisions. The petition makes no effort to show that this question is one of public or general interest (as it clearly is not) and makes no real effort to show that the decision of the Circuit Court of Appeals in this case was in conflict with any decisions of the Court or of other Circuit Courts of Appeals.

The Petition on page 8 states:

> "If the fiduciary or trust relationship existed then this Writ should be granted so that this Court, upon a full inquiry, could decide whether the Circuit Court of Appeal's decision should be reversed. If a trust or fiduciary relationship did not so exist, our petition should be denied."

That statement incorrectly assumes that in considering whether or not the Petition should be granted this Court must first decide whether a fiduciary or trust relationship existed. That question is not presented to this Court by the Petition. This Court will only consider whether the exist-

ence or non-existence of such a relationship on the basis of the facts of this case is a question of such general interest as to require consideration by this Court. Obviously it is not.

The only attempt made by the Petition to argue that there are decisions of this Court or of other Circuit Courts of Appeals contrary to the decision in this case is the statement (Petition, p. 9) that the decisions below are contrary to the decision of this Court in *Young* v. *Higbee Co.*, 324 U. S. 204 (1945). As we show in the argument, below, there is no similarity between the basic facts in *Young* v. *Higbee Co.* and those in this case. The Petition assumes that there is a conflict in decisions because one case decides that a trust relationship exists, and another case decides, on completely different facts, that no such relationship exists. Obviously that is not a conflict of decisions but a difference in facts. No case is cited in the Petition in which the facts were in any respect similar to those in this case.

The only case which we have found involving substantially similar facts is the case of *Godfrey* v. *Powell,* 150 Fed. (2d) 486 (C.C.A. 5th, 1945), in which this Court denied certiorari on December 17, 1945. *Godfrey* v. *Powell,* 66 Sup. Ct. Rep. 272. In that case a trust relationship was claimed to exist on facts similar to those in this case. The District Court and the Circuit Court of Appeals for the Fifth Circuit found that no trust relationship existed and this Court denied certiorari. That denial is a clear precedent for a similar denial in this case.

Brief Summary of Facts

The petition contains a section headed "Summary Statement of Undisputed Facts." For the purpose of this brief we do not need to question the accuracy of that statement in so far as it is factual. However, it omits some very important facts and, therefore, it seems necessary to summarize very briefly the facts really essential for consideration by this Court.

The G.F.&A. was leased to the Seaboard in 1927. Shortly after the Seaboard went into receivership the Seaboard Receivers disaffirmed the lease as being a burden on the Seaboard estate and sought authority from the Interstate Commerce Commission to abandon operation of the G.F.&A. That authority was denied by the Interstate Commerce Commission. In 1935 an agreement was made between the persons then interested in the G.F.&A. and the Seaboard Receivers and was ratified by the Courts having jurisdiction, the G.F.&A. having theretofore been placed in the hands of receivers. That agreement provided in substance that the Seaboard Receivers should continue to operate the G.F.&A. properties for account of the G.F.&A., the earnings or deficits of those properties to be determined on the basis of the so-called General Formula then being used by the Seaboard Receivers to segregate earnings of the various Seaboard Mortgage Divisions. The agreement was to be terminable by either party on six months' notice and was to terminate in any event upon the termination of the Seaboard receivership. *The agreement expressly provided that no amount should be payable by either party to the other in respect of profits or losses arising from the operation until the termination of the agreement.*

When the G.F.&A. was placed under Section 77 of the Bankruptcy Act in 1944, the operating agreement was ratified by the Bankruptcy Court.

Subsequently the courts in charge of the Seaboard receivership directed that the so-called Kennedy Formula instead of the General Formula should be used to determine profits or losses of the G.F.&A., the Kennedy Formula having been the formula approved by the courts for use in connection with the Seaboard Reorganization Plan. The Kennedy Formula is more favorable to the G.F.&A. than the General Formula.

During the early years of operation under the operating agreement the earnings of the G.F.&A., even under the Kennedy Formula, varied from small deficits to small profits. After the beginning of the war, however, the earnings of the G.F.&A. under the Kennedy Formula became larger and if the operating agreement were to be terminated today the Seaboard Receivers would owe the G.F.&A. Trustee a substantial amount, the exact amount having not yet been determined because of certain accounting questions which have not been finally settled. It should be emphasized, however, that no amount now is, or ever has been, payable to the G.F.&A. Trustee, nor will any amount be so payable until the operating agreement is terminated. (See extract from Judge Chesnut's opinion, Appendix A hereto.) The G.F.&A. Trustee has never exercised his election to terminate the operating agreement.

At the end of 1943 a plan for the reorganization of the Seaboard was approved by the District Courts of the United States for the Eastern District of Virginia and for the Southern District of Florida. The G.F.&A. was included in that plan. The Courts found that the stock of the G.F.&A. had no value and should not participate in

the reorganization. The plan offered to the holders of G.F.&A. Bonds $750 in cash for each $1,000 bond.

Shortly after the Seaboard Plan was approved by the Courts a committee representing the G.F.&A. Bonds urged the Seaboard Reorganization Committee to make an immediate offer to purchase the G.F.&A. Bonds at $750 per $1,000 bond, as provided in the Plan, so that the G.F.&A. Bonds could receive the cash provided by the Plan without awaiting the consummation of the Plan if they desired to do so. The Reorganization Committee agreed to make such an offer if authorized to do so by the Virginia Court and applied for authority to do so. The Virginia Court granted the authority by order entered in February, 1944. (Record, p. 9) At the hearing preceding the entry of that order Mr. Simpson, who, with an associate, had theretofore purchased all of the first preferred stock of the G.F.&A. ($1,000,000 par value) for $5,000, requested Judge Chesnut to use the credit balance in favor of the G.F.&A. under the operating agreement to purchase the G.F.&A. Bonds for account of the G.F.&A. Judge Chesnut decided (a) that no money was then payable to the G.F.&A. under the terms of the operating agreement, (b) that if any money were so payable he had no power to dispose of it except by payment to the G.F.&A. Trustee, (c) that only the Georgia Court could determine the use of any moneys which might at any time become due to the G.F.&A. Trustee, and (d) that any money which might be paid over to the G.F.&A. Trustee had been impounded for the benefit of all holders of G.F.&A. Bonds. Accordingly, he granted the petition of the Reorganization Committee, directed the Seaboard Receivers to advance to the Reorganization Committee, out of impounded moneys held by the Seaboard Receivers for the benefit of the Sea-

board bondholders, the amount necessary to purchase the G.F.&A. Bonds, and directed that any amounts which might ultimately become payable to the G.F.&A. or its Trustee under the operating agreement should be held in, and paid out of, a reserve fund of $6,000,000 which had been created pursuant to the Seaboard Reorganization Plan for the purpose of providing for expenses of reorganization and other requirements.

The Reorganization Committee made the offer and it was accepted by holders of 90% of the G.F.&A. Bonds.

Thereupon the G.F.&A. and the G.F.&A. Trustee instituted proceedings in the Georgia Court against the Seaboard Receivers and the Seaboard Reorganization Committee seeking to impose a constructive trust on the purchased bonds for the benefit of the G.F.&A. and its Trustee. The Seaboard Receivers and the Seaboard Reorganization Committee appeared specially to contest the jurisdiction of the Georgia Court over them and the Georgia Court sustained their contentions and dismissed the proceedings.

In view of that action, however, the Reorganization Committee deemed it wise to have the question of their title to the purchased G. F. & A. Bonds specifically considered by the Virginia Court and, accordingly, filed a petition in the Virginia Court to remove a cloud on their title to the G. F. & A. Bonds. That petition was filed not because, as stated on page 8 of the petition, the Reorganization Committee felt "that there would remain a serious question as to its title to the bonds" but because, in view of the attack on title made by the G. F. & A. and its Trustee and in view of the fact that the G. F. & A. Trustee had not been a party to the Seaboard receivership proceedings, it seemed fair and

wise to have the question definitively litigated and settled in a proceeding to which the G. F. & A. Trustee would be made a party. It was specifically understood that the matter would be considered by Judge Chesnut *de novo*, without regard to the fact that it had been in substance already decided by Judge Chesnut's order of February 8, 1944, authorizing the purchase of the G. F. & A. Bonds.

Judge Chesnut, after a full hearing, wrote a complete and detailed opinion (R., pp. 27-56) in which he reached the conclusion that the Reorganization Committee had title to the purchased G. F. & A. Bonds and that no constructive trust should be imposed thereon for the benefit of the G. F. & A. or its Trustee. The G. F. & A. and its Trustee appealed from that decision and the Circuit Court of Appeals affirmed on the basis of the opinion of the District Court without writing a new opinion. It is from that decision of the Circuit Court of Appeals that certiorari is now sought.

Argument

POINT I

Petitioners have shown no grounds for granting the petition.

1. Petitioners do not claim that this case presents any question of public or general interest.

As indicated above, petitioners do not claim that the question which they seek to have this Court decide is one of public or general interest. Clearly it is not such a question. The question decided by the courts below was simply

whether *on the facts of this particular case* there was any such relationship between the Seaboard creditors or the Seaboard Receivers or the Seaboard Reorganization Committee, on the one hand, and the G.F. & A. or its Trustee or its stockholders, on the other, as would give rise to a constructive trust in favor of the G.F. & A. Trustee in respect of G.F. & A. Bonds purchased by the Reorganization Committee with money belonging to the Seaboard creditors. The answer to that question depends entirely on the facts of this particular case and the courts below, after consideration of all the facts, have found that there was no such relationship. No question of public or general interest is involved. The Courts below did not decide any novel or important question of law. They merely applied well established legal principles to the facts of this case.

2. There are no decisions of this Court or of the Circuit Courts of Appeals which are in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in this case.

Petitioners claim that the case of *Young* v. *Higbee Co.*, 324 U. S. 204 (1945) is contrary to the decision of the Circuit Court of Appeals in this case. There is no analogy whatsoever between the two cases. In *Young* v. *Higbee Co.* this Court decided that when two holders of preferred stock of a corporation being reorganized under Chapter X of the Bankruptcy Act appealed from an order approving a plan of reorganization and then made a settlement involving the sale of their stock and their appeal at a price far in excess of the value of their stock, they must be held, under the law affecting bankruptcy cases, to have acted not only for themselves but for all other stockholders similarly situated

and could be held accountable to such other stockholders for the excess of the amount which they received on the settlement over the fair value of their stock.

A mere statement of the question involved in *Young* v. *Higbee Co.* is sufficient to show that there is no analogy between that case and the present case. The same thing is true as to all of the cases cited on pages 17 and 18 of the petition. In no one of them were the facts in any way analogous to the facts of the present case.

There is, however, one decision which is substantially on all fours with the present case. That is the case of *Godfrey* v. *Powell*, 150 Fed. (2d) 486 (C. C. A. 5th, 1945), in which this Court denied certiorari on December 17, 1945. *Godfrey* v. *Powell*, 66 Sup. Ct. Rep. 272. That case also arose in connection with the Seaboard reorganization. It was claimed that the Seaboard Receivers, who were also receivers of the lines of a subsidiary company (the Seaboard-All Florida), must be charged with a constructive trust in respect of Seaboard-All Florida Bonds which they, as Seaboard Receivers, purchased out of funds belonging to the Seaboard creditors, such constructive trust to be in favor of the Seaboard-All Florida bondholders who did not sell their bonds to the Seaboard Receivers. The Circuit Court of Appeals held that there was no constructive trust and this Court denied certiorari.

The relationships in *Godfrey* v. *Powell* were not, in substance, different from the relationships in this case and the decision of the Circuit Court of Appeals for the Fourth Circuit in this case was in accord with the decision of the Circuit Court of Appeals for the Fifth Circuit in that case.

POINT II

The decisions of the Circuit Court of Appeals and of the District Court in this case were correct.

The opinion of the District Court, printed in the Record at pages 27 to 56, inclusive, sets out so clearly and fully all of the arguments made on behalf of the petitioners here, and the conclusive answers to those arguments, that we respectfully refer this Court to that opinion if this Court should be interested in a full statement of the facts and of the basis of the decisions below. We believe, however, that no such consideration is necessary in this case because it is so clear that this is not a case which justifies the exercise by this Court of its powers of certiorari.

POINT III

The petition for certiorari should be denied.

The petition for certiorari should be denied, with costs, and such other relief as to the Court may seem just.

Dated May 14, 1946

Respectfully submitted,
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APPENDIX A

Extract from Opinion Filed July 31, 1945, of Judge W. Calvin Chesnut

(R. pages 41-43)

"The first contention of the G. F. & A. is that the bonds were paid for by moneys held by the Receivers for the account of the G. F. & A. and then payable to it; or at least that it should be held that the cost of the bonds should be charged against the G. F. & A. in the operating account. This contention is clearly untenable. Under the operating orders there is not now and never has been in the past any sum of money due from the Seaboard Receivers to the G. F. & A.; and whether on final account there will be any sum due and payable is still a matter of uncertainty. It is also presently uncertain when the operating agreement will be terminated. Evidently the Georgia Trustee is not now prepared to make a recommendation to the Georgia Court that it should be terminated. Even if the Georgia Court promptly decides to authorize its Trustee to give the six months notice for termination, I understand the approval of the Interstate Commerce Commission would have to be obtained before independent operation of the Road by the G. F. & A. or satisfactory arrangement made for its continuation in the public interest. Likewise I assume that if this court should now authorize the Seaboard Receivers to give notice of termination, approval of the Interstate Commerce Commission would also be necessary. It is well known that at the present time railroad operations are largely under the control of the Interstate Commerce Commission in the public interest. And if the operation must be continued by the Receivers for a considerable time in the future, the cost of much needed deferred maintenance and betterments will probably greatly reduce or exhaust the present 'tentative' credit. * * *

"Apart from this consideration, there is clearly no authority under the present operating orders to charge the purchase price of the bonds to the operating account. And this court clearly would have no authority to make such a charge if there were now presently due and payable a credit balance to the G. F. & A. It would as a matter of law have to be paid to the Georgia Trustee for proper disposition under section 77, and apparently any net sum remaining after other proper disposition of the funds, would be claimed by the Bankers Trust Company as Trustee under the GF&A mortgage, in consequence of prior impounding orders obtained by it from the Georgia court. It also appears from the evidence in this case that any net earnings to which the GF&A might now be entitled would be possibly subject to the payment of income taxes, which is a matter, of course, with which this court is not concerned but would necessarily be involved in the Georgia Trustee's accounting in the Georgia Court. Under no aspect of the case would it have been permissible for this court when the original order for the purchase was made on February 8, 1944, or at this time, to direct that the cost of the bonds be charged against the operating accounts."